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No.

In The

SUPREME COURT OF THE UNITED STATES

THOMAS M BIDEGARY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Where a professional tax preparer who is not a tax protestor is indicted for tax fraud per 26 U.S.C. § 7206, and his theory of defense at trial is that he acted in good faith, in that he had a genuine (whether or not reasonable) misunderstanding of the tax code's requirements regarding deductions and credits which he improperly claimed for his clients; such a defendant presents evidence supporting that theory of defense; and the trial judge gives an accurate instruction regarding the definition of "willfulness," which does not specifically reference "good faith," is such a defendant entitled as a matter of right to a separate instruction that defines the term of "good faith" within the meaning of Cheek v. United States, 498 U.S. 192, 202-06 (1991)?

Put another way, is the question presented for review governed by the "Ninth Circuit view" that such a defendant is not so entitled to such a separate instruction, or is it governed by the "Tenth Circuit view" that such a defendant **is**, in fact, entitled to such an instruction and it is reversible error under these circumstances not to give it? How should the split among the Circuits be resolved?

II. NAME OF PARTIES

Thomas M. Bidegary, Petitioner; and the United States of America, Respondent.

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III. CITES OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED

United States of America v. Bidegary, Unpublished Memorandum, United States Court of Appeals in and for the Ninth Circuit, Case No. 01-10293, filed April 5, 2002.

IV. STATEMENT OF BASIS OF JURISDICTION

This is an Application for *Certiorari* from the United States Court of Appeals for the Ninth Circuit.

Appellant, a professional tax preparer, who works in Winnemucca, Nevada, was indicted on 24 counts of aiding and assisting of the filing of false tax returns, 26 U.S.C. § 7206(2), one count of subscribing his own false tax return, in violation of 26 U.S.C. § 7206(1), and one count of theft and conversion of government funds, in violation of 18 U.S.C. § 641. The within Petition does not concern that count. Among the Title 26 counts, the Government's theory was that Bidegary falsely and fraudulently claimed certain deductions and credits for certain clients, including himself. Generally, the categories of alleged false, fraudulent credits were: vehicle expense deductions; charitable contributions; head of household credits and earned income credits; and in isolated cases, other items of deductible expenses.

Mr. Bidegary took the witness stand at his trial and explained under oath his rationale for claiming all of the exemptions, deductions and credits at issue. He

believed that he had done nothing wrong. He also called an expert witness, a C.P.A., who testified that the vehicle travel expenses was an open item of debate in view of the unique nature of the occupation of the taxpayers in question. The expert also testified that Mr. Bidegary's methodologies for estimating charitable contributions was consistent with the practice of other professional preparers.

Prior to trial, Bidegary proposed two jury instructions. The first was a "contention" instruction which stated:

> "Defendant, Thomas M. Bidegary, moreover, contends that he is not guilty of the crimes charged because he prepared all tax returns in good faith, and based upon the information provided by the taxpayers." (ER 6: 8)

That instruction was given. (ER 9: 114) However, neither it nor any other instruction given specifically defined the term "good faith" for the jury of 12 laypersons.

He prepared and proposed a second instruction that comprehensibly defined the term "willfully," one of the *prima facie* elements of 26 U.S.C. § 7206, as follows:

> To find the defendant guilty of violating § 7206(2), you must not only find that he did the acts of which he stands charged, but you must also find that the acts were done willfully by the

defendant.

The word "willfully" as used in this statute, means a voluntarily, intentional violation of a known legal duty. In other words, the defendant must have acted voluntary [sic] and intentionally and with the specific intent to do something he knew the law prohibited, that is to say, with intent either to disobey or to disregard the law. It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" on [sic] evil motive.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant, and all facts and circumstances in evidence that aid in the determination of his state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind, but a careful intelligent consideration of the facts and circumstances shown by the evidence in a case may infer what another's intentions were in doing or not doing things. With the knowledge of the definite, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on

circumstantial evidence in determining the guilt or innocence of the defendant.

> **The defendant's conduct is not willful if he acted through negligence, gross inadvertence, careless disregard, justifiable excuse, mistake, or due to a good faith misunderstanding of the requirements of the law.** (ER 6: 81)

During the settlement of jury instructions, it became clear that the proposed defense instruction on "willfulness" was taken directly from United States v. Claiborne, 765 F.2d 784, 797-98 (9th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986). (ER 10: 170-72; TT 8: 1738-40) There is no question but that the proferred instruction is a correct statement of law, not only because of Claiborne, but also because of Cheek. The government's position, as well as the trial court's, was that the instructions that the government tendered on "willfulness" were all that was required to define completely the required *mens rea* of the charged offense. (ER 10: 170-72; TT Day 8: 1738-40).

The actual instructions on the term "willfully," as given to the jury, read as follows:

> In order for the Defendant to be found guilty of the charges in Counts I through XVII, XXI and XXIII - XXV of the Indictment, the government must prove each of the following elements beyond a reasonable doubt:

First, the Defendant, Thomas M. Bidegary, willfully aided, assisted or advised a person in the preparation of an income tax return that was false or fraudulent; and

Second, the return was false or fraudulent as to something necessary to a determination of whether income tax is owed.

A person acts "willfully" by voluntarily and intentionally assisting or advising another to do something that the person knows, disobeys or disregards the law.

The government is not required to prove that the taxpayer knew that the return was false.

(Jury Instruction No 28, ER: 139)

. . .

Defendant, Thomas M. Bidegary, is charged in Count XXII . . . with making and subscribing a false income tax return in violation of 26 U.S.C. § 7206(1). In order for each Defendant to be found guilty of the charges, the government must prove each of the following elements beyond a reasonable doubt:

First, the Defendant made and subscribed a return with the Internal Revenue Service that

was incorrect as to a material matter;

Second, that the return contained a written declaration that it was made under the penalty of perjury; and **third, that the Defendant did not believe the return to be true and correct as to the material matter or matters charged in the Indictment.**

Fourth, that the Defendant filing the tax return acted willfully.

(Jury Instruction No. 31, ER 9: 142)

. . .

An act is done willfully if done voluntarily and intentionally with the purpose of violating a known legal duty.

(Jury Instruction No. 33, ER 9: 144)

On appeal, Mr. Bidegary raised five assignments of error. The first issue was: "The trial committed reversible error in refusing to give the defense - proffered jury instruction on the key trial issue at bar, or a definition of the 'good faith' aspect of the *prima facie* element of 'willfulness' under 26 U.S.C. § 7206." In rejecting this assignment of error, the United States Court of Appeals for the Ninth Circuit stated as follows:

Bidegary first argues that the trial court

committed reversible error in refusing to instruct the jury that his conduct was not willful under 26 U.S.C. § 7206 if he acted with negligence, gross inadvertence, careless disregard, justifiable excuse, mistake, or a good faith misunderstanding of the requirements of the law. We review a district court's formulation of jury instruction for an abuse of discretion. United States v. Vallejo, 237 F.3d 1008, 1024 (9th Cir. 2001). 'Whether a district court's instructions adequately covered a defendant's proffered defense is reviewed *de novo*.' United States v. Pierre, 254 F.3d 872, 875 (9th Cir. 2001).

A separate instruction of good faith is unnecessary where the trial court has adequately instructed the jury on specific intent. See: United States v. Solomon, 825 F.2d 1292, 1297 (9th Cir. 1987); Accord: United States v. Dees, 34 F.3d 838, 842-43 (9th Cir. 1994); United States v. Dorotich, 900 F.2d 192, 194 (9th Cir. 1990). The instructions given here adequately advised the jury of the specific intent required under § 7206(1) and 7206(2), and they preclude a finding of willfulness if Bidegary acted through negligence, gross inadvertence, careless disregard, justifiable excuse, mistake, or due to a good faith misunderstanding of the requirements of the law. A separate good faith instruction was therefore not required. Solomon, 825 F.2d at 1297. Cheek v. United States [*ante*] is not to the contrary. It simply holds that willfulness in criminal tax prosecutions may be negated by a

> good faith misunderstanding of the legal duties imposed by the tax laws, even if the misunderstanding is not objectively reasonable. [cite omitted] The district court did not abuse its discretion, and the instructions given adequately covered Bidegary's good-faith defense argument.

The adjudicating panel granted Bidegary an extension of time to file his Petition for Rehearing *en banc*. On July 17, 2002, the adjudicating panel denied the Petition for Rehearing *en banc*. The point of the Petition for Rehearing *en banc* was that the Ninth Circuit view on the issue at bench could not be reconciled with the views of the Tenth Circuit, the Eighth Circuit, the Eleventh Circuit, the Fifth Circuit, the Sixth Circuit, or the Second Circuit.

This Petition has been filed within 90 days of the Final Order Denying Rehearing. Therefore, this Court has jurisdiction to hear this Petition pursuant to 28 U.S.C. § 2101(d) and U.S. Sup. Ct. Rule 13.1 and 13.3.

Per U.S. Sup. Ct. Rule 10(a) and (c), we contend that this Court should grant *Certiorari* because the lower federal courts are in decisional conflict regarding an important federal question, and relevant decisions of this Court support both views.

V. FEDERAL LAW INVOLVED

1. 26 U.S.C. § 7206.
2. The due process clause of the Fifth Amendment to the Constitution of the United States;

3. The right to a speedy and public trial by an impartial jury clause of the Sixth Amendment to the Constitution of the United States.

VI. STATEMENT OF FACTS

Please see Statement of Basis of Jurisdiction, above.

VII. REASONS FOR GRANTING THE WRIT

The Circuits are severely split on the question presented for review. In a way, that is understandable. This Honorable Court has said different things regarding the question presented for review which, in and of themselves, could lead to different results among the Circuits.

In United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), this Court held that a criminal defendant is entitled to a separate jury instruction with respect to his good faith and lack of evil motive, to defeat the element of willfulness in a prosecution for filing a false tax return, where the trial issue concerned propriety of the deductions claimed and the defendant's claim of Fifth Amendment privilege in response to official inquiries. Murdock, 290 U.S. at 396, 54 S.Ct. at 226.

However, in United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed. 2d 12 (1976) [*per curiam*], this Court held that the terms "willful" in the context of 26 U.S.C. § 7206(1) simply means a voluntary,

intentional violation of a known legal duty; there is no requirement of showing of "evil motive" beyond a specific intent to violate the law. Pomponio, 429 U.S. at 13-14, 97 S.Ct. at 23-24. In a one line piece of *dictum*, without any cite to authority, this Court noted that, therefore, an additional instruction on good faith is unnecessary. Pomponio, 429 U.S. at 14, 97 S.Ct. at 24. That is, if the jury instruction **implicitly** requires a finding of knowledge of the true nature of the transaction, as reported on a federal income tax return, the instruction is sufficient. Pomponio, 429 U.S. 14 at n.4, 97 S.Ct. at 24, n.4.

Then, in Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed. 2d 617 (991), a 26 U.S.C. § 7203 prosecution of a tax protestor, the jury was instructed that the government could not prove a voluntary and intentional violation of a known legal duty by showing mistake, ignorance or negligence. Cheek, 498 U.S. at 196, 111 S.Ct. at 607-08. However, the trial court further advised the jury that an "**objectively reasonable**" good-faith misunderstanding of the law would negate willfulness, but mere disagreement would not. Cheek, 498 U.S. at 196. 111 S.Ct. at 608.

In holding that instruction to be erroneous, this Court first explained in length why criminal tax cases provide an exception to the principle that a mistake of law is no defense to a criminal prosecution, as everyone is presumed to know the law. Cheek, 498 U.S. at 199-200, 111 S.Ct. at 609. This Court also noted in Cheek the Murdock holding, that a defendant is entitled to an

instruction with respect to whether he acted in good faith based on his actual belief. Cheek, 498 U.S. at 200, 111 S.Ct. at 609-10.

This Honorable Court held in Cheek that a defendant's claim of good faith belief did not have to be objectively reasonable in order for it to negate the government's evidence purporting to show the defendant's awareness of his duties under the tax laws. 498 U.S. at 203, 111 S.Ct. at 611. Therefore, it was error to instruct the jury to disregard evidence of the defendant's actual beliefs. Cheek, 498 U.S. at 203-04, 111 S.Ct. at 611.

Finally, overriding this entire area of the law is a familiar principle, as set forth in Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed. 2d 54 (1988): As a general principle, a criminal defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. Mathews, 485 U.S. at 63, 108 S.Ct. at 887, and cases and authorities cited therein.

As a corollary to Mathews, and as is undisputedly the law throughout the United States, a failure to instruct a jury upon a legally and factually cognizable theory of defense is not subject to harmless error analysis. A reviewing court affirms a conviction, in the face of failure to give a "theory of the defense" instruction, only if the instructions actually given, taken as a whole, adequately encompass the defendant's theory. United States v. Sarno, 73 F.3d 1470, 1485 (9th

Cir. 1995), and cases cited therein.

In the face of these applicable principles of law, there are two ways to look at the question presented for review:

(1) Where a defendant is charged with a Title 26 criminal violation, and contends that he acted in good faith (meaning that he is not a tax protestor and had a genuine, if not reasonable, misapprehension of the requirements of the tax code and regulations), he is not *per se* entitled to such an instruction as long as the jury receives a "Pomponio" instruction regarding willfulness. However, if the trial court actually gives a jury instruction on the meaning of "good faith," it must be consistent with Cheek; otherwise, reversible error ensues. This is the "Ninth Circuit view." See: United States v. Powell, 955 F.2d 1206, 1211-13 (9th Cir. 1991); and see cases, *ante*.

(2) In such a case where a non-tax protestor defendant's theory of the case is that he had a genuine, if unreasonable, understanding of the legal requirements of the tax code and regulations, a general "willfulness" instruction does not precisely convey the essence of Cheek to a jury of 12 lay persons, who would normally operate under the presumption that mistake of law is no defense in a criminal prosecution. Therefore, such a defendant is entitled to a "Cheek good faith" instruction, and it is reversible error not to give it; Pomponio does not mandate a contrary result. This is the "Tenth Circuit view."

As we shall now show, there is a significant split

of authority among the Circuits on this issue, but the "Tenth Circuit view" is "the better view."

In United States v. Harting, 879 F.2d 765 (10th Cir. 1989), the Tenth Circuit reversed a conviction of failure to file (26 U.S.C. § 7203). Relying upon Mathews, and its own authority, the Tenth Circuit held that the trial court must instruct separately on the defense of good faith, as instructions on willfulness, or an untruth of representations of fraudulent statements, are **not** sufficient for this purpose. Harting, 879 F.2d at 767-68. In addressing Pomponio, the Tenth Circuit stated:

> The government argues that the decision of the Supreme Court in [Pomponio] contradicts the requirement we articulated . . . that a general instruction on willfulness is not sufficient when the evidence supports the giving of a good faith instruction. [cites omitted]. The government relies on the statement of the Supreme Court that 'the trial judge in the instant case adequately instructed the jury on willfulness. An additional instruction on good faith was unnecessary.' Pomponio, 429 U.S. at 13.
>
> While we recognize the tension between this language and Pomponio and our requirement of a good faith instruction [United States v. Hopkins, 744 F.2d 716, 718 (10th Cir. 1984)], a close reading of Pomponio reveals ambiguity, and we find Hopkins to be consistent with the substance, if not the language, of Pomponio.

Harting, 879 F.2d at 769.

After discussing the history of Pomponio, the Tenth Circuit went on to explain:

> Rather than actually concluding that such instructions were unnecessary, the [Supreme] Court determined that 'such instructions were given and that they were adequate.' [cite omitted] These instructions essentially presented a good faith defense, referring **specifically** to the defendant's knowledge and essentially addressing, separately from the willfulness instruction, the defendant's entitlement to acquittal should the jury find that the defendants in fact believe the payments in question to be loans. Therefore, we find the separate good faith instruction requirement in Hopkins to be consistent with the Supreme Court's holding in Pomponio. Accordingly, as we have concluded that a reasonable jury could have accepted Harting's good-faith defense, the failure to instruct the jury regarding good faith constitutes error under Mathews and Hopkins, and we must reverse the judgment of the trial court.

Harting, 879 F.2d at 770.

While the Eleventh Circuit in United States v. Morris, 20 F.3d 1111 (11th Cir. 1994) does not discuss Pomponio, it is in accord with Harting, and it captures the essence of the problem at hand:

> The second factor rendering these instructions inadequate is the Cheek requirement that the good faith of the defendant in this type of case need not be objectively reasonable. This principle represents a notable departure from the more traditional crime, where a mistake of the law is no defense. The instruction does not make clear that a good faith belief by the appellants that they were complying with the tax laws, **whether or not objectively reasonable**, negates the specific intent element of the crime. Although there is no requirement in this circuit that jury instructions specifically note that a good faith defense need not be objectively reasonable, when viewed as a whole, the charge here is insufficient to convey the permissible breadth of the appellants' Cheek good faith defense.
>
> Morris, 20 F.3d at 1117-18.

The reasoning of the Eleventh Circuit in Morris is also the essential reasoning of the Eighth Circuit in United States v. Casperson, 773 F.2d 216, 223 (8th Cir. 1985). Based upon Casperson and United States v. Ammons, 464 F.2d 414, 417 (8th Cir.), *cert. denied*, 409 U.S. 988 (1972), § 9.08 of the *Eighth Circuit Manual Model Jury Instructions (Criminal 2000)*, contains the specific good faith instruction for income tax prosecutions, modeling Cheek, and the Committee Comments thereto note that this instruction is **required** per Casperson and Ammons, where the theory of defense is good faith, where the defendant introduces evidence sufficient to warrant the

instruction, and where the defendant requests the instruction. See: United States v. Scherer, 653 F.2d 334, 337 (8th Cir.), *cert. denied*, 454 U.S. 1034 (1981).

The Second Circuit case of United States v. Durham, 825 F.2d 716 (2d Cir. 1987) is not a Title 26 case. However, its rationale is consistent with the Eleventh Circuit's rationale in Morris and the Second Circuit applied Durham to a Title 26 case, United States v. Regan, 937 F.2d 823, 826-27 (2d Cir. 1991), *cert. denied sub nom*, 504 U.S. 940 (1992). In Regan, the Second Circuit reversed a tax fraud conviction, involving the within question presented for review. The Second Circuit stated in Durham:

> In our view, the court's general instructions on specific intent were not adequate to inform the jury that if it believed the defendant's theory, it was entitled to conclude that they did not have the requisite intent to be convicted of the offense as charged. The court's initial instructions link the element of specific intent only to attempt to violate the law in general, but not intent to burn the subject building. The court's recharge on the definition of conspiracy did not mention the element of specific intent at all. As we have previously noted, it is of some value to a defendant to have the trial judge clearly indicate to the jury what his theory of the case is, and that that theory, if believed, justifies acquittal [cite omitted].

Durham, 825 F.2d at 719.

And specifically, the Second Circuit stated in Regan:

> Despite numerous requests by appellants to charge otherwise, the district court persisted in viewing [the tax code section dealing with the capital gains trial issue therein] objectively, insisting that the court was the sole judge of the law. That, of course, was true. However, the issue for the jury was not how the district court interpreted [the pertinent tax code section]; it was how the defendants in good faith interpreted it. A jury is the ultimate discipline to a silly argument. [cite omitted]
>
> Regan, 937 F.2d at 827.

Also in accord with the reasoning employed by the Eleventh and Second Circuits in Morris and Durham is the Fifth Circuit in United States v. Goss, 650 F.2d 1336, 1344-45 (5th Cir. 1986). There, in reversing a Title 18 conviction wherein good faith was a defense, the Fifth Circuit stated:

> The trial judge did charge the jury that a finding of specific intent to defraud is required for conviction. The government urges us to find this sufficient to encompass the good faith defense . . . [C]harging the jury that a finding of specific intent to defraud is required for conviction, while it may generally constitute the negative instruction, i.e., that, if the defendants

acted in good faith, they could not have had this specific intent to defraud required for conviction, does not direct the jury's attention to the defense of good faith with specificity to avoid reversible error.

Goss, 650 F.2d at 1345.

United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988), also the reversal of a Title 26 conviction, employs the same reasoning as the other Circuits. That is, even though an accurate general statement of the law regarding willfulness is not in and of itself improper, it does not capture the essence of the Cheek good faith defense and therefore does not adequately, fully and accurately state the law, in and of itself. Duncan, 850 F.2d at 1117-18.

Interestingly, this Court will not find any particularly useful post-1991 cases on point out of the First and Seventh Circuits. That is because *First Circuit Pattern Jury Instruction, Criminal (1998)* §§ 4.25 and § 4.27 have Cheek "gross negligence" and "subjective knowledge" language **directly in them**, thereby satisfying Pomponio as well as Cheek. See: United States v. Hogan, 861 F.2d 312, 316 (1st Cir. 1988). And, *Seventh Circuit, Federal Jury Instruction, Criminal (1999)*, § 6.11, is a specific good faith instruction for Title 26 cases which is taken directly from Cheek. Therefore, following those pattern instruction in those Circuits, this issue would not arise; but in those Circuits, a professional tax preparer who prepares his clients' returns on an honest but unreasonable belief as to what

the Internal Revenue Code permits and/or mandates would not be convicted therein, at least by a jury who understands the pattern instructions.

Thus, if Bidegary's conviction had occurred in a United States District Court in the First, Second, Fifth, Sixth, Seventh, Eighth, Tenth or Eleventh Circuits, this case would not be here (except, perhaps, on the **Government's** Petition for Writ of *Certiorari*). Unfortunately for Mr. Bidegary, his conviction occurred in the District of Nevada, which is part of the United States Court of Appeal for the Ninth Circuit. As the Ninth Circuit correctly noted in its memorandum disposition, the law in that Circuit for some time has been that a defendant such as Bidegary is not entitled to a specific good faith instruction, even in the wake of Cheek. Paradoxically, in one of the many cases cited by the Ninth Circuit in support of that proposition, United States v. Dorotich, 900 F.2d 192 (9th Cir. 1990), the Ninth Circuit noted:

> We recognize that a number of circuits have held in tax fraud cases that it is reversible error to refuse to give an instruction on good faith reliance on expert advice where some evidence exists to support such a defense. United States v. Duncan [*supra*]; United States v. Mitchell, 495 F.2d 285, 287-88 (4th Cir. 1974); United States v. Platt, 435 F.2d 789, 792 (2d Cir. 1970); Bursten v. United States, 395 F.2d 976, 981-82 (5th Cir. 1968); United States v. Phillips, 217 F.2d 435, 440-41 (7th Cir. 1954). However, [United States v. Solomon, 825 F.2d 1292, 1297

(9th Cir. 1987)] precludes us from adopting the reasoning of these decisions.

Dorotich, 900 F.2d at 194.

Here is another irony: The existing law in both the Fourth and Sixth Circuits supports **both** the defense **and** the Government's position!

As noted above, the Sixth Circuit case of Duncan commands a separate "good faith" instruction, where the same is offered and "good faith" is the theory of defense. Duncan cannot be reconciled with United States v. McGuire, 744 F.2d 1197, 1201-02 (6th Cir. 1984), which labels the failure to give such an instruction in the within circumstances as "harmless error."

In the Fourth Circuit, the case of United States v. Fowler, 932 F.2d 306, 317 (4th Cir. 1991), citing Pomponio, summarily declares that a separate good faith instruction is not required when a proper intent instruction is given. Yet, as we have seen, the Fourth Circuit case of Mitchell is to the contrary - and not only has Mitchell not been overruled, but no court has questioned its holding - except, of course, the Ninth Circuit in Dorotich.

Insofar as we can determine, the only other Circuits besides the Ninth which consistently declare that a defendant such as Bidegary is not entitled to a separate good faith instruction are the D.C. Circuit and the Third Circuit. See: United States v. Gambler, 662 F.2d 834, 837 (D.C. Cir. 1981); United States v. Gross,

961 F.2d 1097, 1103 (3d Cir. 1992).

We submit that the "separate jury instruction position" is the correct one, ultimately, and reviewing the jury instructions against the facts of this case reveal why that is so.

Here, the jury was told that an act is done willfully if done voluntarily and intentionally with the purpose of violating a known legal duty, Instruction No. 33. However, a tax preparer has the "known legal duty" to stay current with the tax laws. A jury could have rationally concluded, from the language of that instruction, that Bidegary violated that known legal duty, and that fact made him a felon-to-be.

In Jury Instructions Nos. 28 and 31, the jury was told that a person acts "willfully" by voluntarily and intentionally assisting or advising another to do something that the person knows disobeys or disregards the law; and that the government must prove beyond a reasonable doubt that the defendant did not believe the return to be true correct as to the material matters charged in the Indictment. All of that begs the central question: "Knowledge or belief on an objective basis, or knowledge or belief on a subjective basis?" The instructions did not delineate. A jury could have decided that "knowledge" was to be determined on an objective basis. Undeniably, had the court specifically so instructed the jury, that would have constituted reversible error, per Cheek and Powell. And, on these facts, the jury easily could have concluded that Bidegary "should have known better," and that finding would

lead him to the status of felon-to-be.

To compound the matter, suppose the jury studied Instructions 31 and 33, determined that Bidegary in fact did not believe the returns he prepared to be false, necessarily, but had violated his known legal duty to stay current with tax laws. A correctly instructed jury would have been lead to the conclusion to acquit Bidegary; but this jury could have, in the absence of more precise instructions, decided to give controlling weight in favor of its interpretation of Instruction No. 33 and its concomitant finding. On that analysis, a man entitled to a "not guilty" verdict thereby would have been convicted. Nothing in this record suggests that the jury didn't engage in that type of thought process.

With a published opinion, declaring that Murdock is still an accurate statement of the law, notwithstanding Pomponio, and that a defendant such as Mr. Bidegary is absolutely entitled to a separate good faith instruction, where he tenders evidence supporting his theory of the case and tenders an appropriate instruction, tax preparers such as Bidegary in the future will not have that problem. Until then, tax preparers who engage in malpractice are going to prison - but

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only in the Ninth, D.C. and Third Circuits (as well as the Fourth and Sixth Circuits --- maybe).

DATED this 16 day of October, 2002

Respectfully submitted,

LAW OFFICE OF RICHARD F. CORNELL
150 Ridge Street, Second Floor
Reno, Nevada 89501

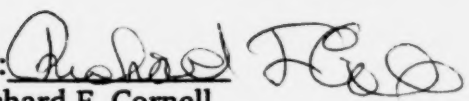
BY: 
Richard F. Cornell,
Attorney for Petitioner,
Thomas M. Bidegary

EXHIBIT 1

NOT FOR PUBLICATION

FILED
April 5, 2002
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee,	No. 01-10293 D.C. No. CR-99- 00006-DWH(RAM)
v.	
THOMAS M. BIDEGARY, Defendant - Appellant.	MEMORANDUM*

Appeal from the United States District Court for the District of Nevada David Warner Hagen, District Judge, Presiding

Argued & Submitted February 15, 2002 San Francisco, CA

Before: WALLACE, KOZINSKI and PAEZ, Circuit Judges

Bidegary appeals from a judgment of conviction pursuant to 26 U.S.C. §§ 7206(1) and 7206(2), for willfully subscribing a false tax return and willfully causing the preparation and filing of false tax returns. The district court had

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

1.

Bidegary first argues that the trial court committed reversible error in refusing to instruct the jury that his conduct was not willful under 26 U.S.C. § 7206 if he acted with negligence, gross inadvertence, careless disregard, justifiable excuse, mistake, or a good faith misunderstanding of the requirements of the law. We review a district court's formulation of jury instructions for an abuse of discretion. United States v. Vallejo, 237 F.3d 1008, 1024 (9th Cir. 2001). "[Whether a district court's instructions adequately covered a defendant's proffered defense [] is reviewed de novo." United States v. Pierre, 254 F.3d 872, 875 (9th Cir. 2001).

A separate instruction on good faith is unnecessary where the trial court has adequately instructed the jury on specific intent. See United States v. Solomon, 825 F.2d 1292, 1297 (9th Cir. 1987); accord United States v Dees, 34 F.3d 838, 842-43 (9th Cit. 1994); United States v. Dorotich, 900 F.2d 192, 194 (9th Cir. 1990). The instructions given here adequately advised the jury of the specific intent required under sections 7206(1) and 7206(2), and they preclude a finding of willfulness if Bidegary acted though negligence, gross inadvertence, careless disregard, justifiable excuse, mistake, or a good faith misunderstanding of the requirements of the law. A separate good faith instruction was therefore not required. Solomon, 825 F.2d at 1297. Cheek v. United States, 498 U.S. 192 (1991) is not to the contrary. It simply holds that willfulness in criminal tax prosecutions may be negated by a good faith misunderstanding of the legal duties imposed by the tax laws, even if the misunderstanding is not objectively reasonable. Id. at 200-02. The district court did not abuse its discretion, and the instructions given adequately covered Bidegary's good-faith defense argument.

II.

Bidegary argues that constitutional error resulted when

the jury was told that someone acts "willfully" when he acts intentionally with the purpose of violating a known legal duty. He says this fails to describe with sufficient specificity a section 7206 violation: the jury could have believed that the "known legal duty" was a duty to stay current with the tax law.

Jury Instructions 30 and 31 explicitly and correctly charged the jury with determining whether Bidegary willfully violated the duty not to file a return that is incorrect as to a material matter under section 7206(1). The known legal duty identified in section 7206(2) is the duty not to assist in the filing of fraudulent or false returns. See United States v. Kellogg, 955 F.2d 1244, 1248 (9th Cir. 1992).

Instructions 27, 28, and 29 correctly charged the jury with determining whether defendant willfully violated that duty. The jury was thus properly instructed as to the elements of the offenses, and there was no ambiguity as to what duties Bidegary was charged with violating.

III.

Bidegary argues that his sentence was unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000), because the failure to use a special verdict form rendered unclear the jury's verdict in finding Bidegary guilty of each of the offenses. "As a general rule, the [trial] court has complete discretion over whether to have the jury return a special verdict or a general verdict." Floyd vv. Laws. 929 F.2d 1390, 1395 (9th Cit. 1991) (citations omitted). We review for an abuse of discretion the district court's refusal to use a special verdict form. See Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1374 (9th Cit. 1987).

While the statutory maximum sentence for a violation of section 7206 is three years, Bidegary was sentenced to thirty-three months, three months shy of the maximum. 26 U.S.C. § 7206. Therefore, even if the district court considered facts

not found by a jury beyond a reasonable doubt, the consideration did result in a sentence that exceeded the prescribed statutory maximum, rendering Apprendi inapplicable. See Apprendi, 530 U.S. at 490.

Bidegary also cites United States v. Jones, 231 F.3d 508, 516-17, n.5 (9th Cir. 2000), for the proposition that special verdicts are encouraged. However, Jones specifically recommended the use of special verdicts in entrapment cases only. Id. Special verdicts in criminal trials have long been disfavored. United States v. Shelton, 588 F.2d 1242, 1251 (9th Cir. 1978) (citations omitted). This is particularly true where, as here, the jury is instructed that it must unanimously find that at least one item on each return was materially false or fraudulent. See United States v. Jessee, 605 F.2d 430, 431 (9th Cir. 1979) (citation omitted). There was no abuse of discretion.

IV.

Bidegary next argues that the district court erred in upwardly enhancing his sentence for obstructing justice under U.S.S.G. § 3C1.1, because the false handwriting exemplar was not material to either the investigation or prosecution of his case. "We review de novo the district court's interpretation of the sentencing guidelines." United States v Jordan, 256 F.3d 922, 926 (9th Cir. 2001) (citing United States v. Dixon, 201 F.3d 1223, 1233 (9th Cir. 2000)).

A false statement or attempted obstruction of justice need not actually obstruct justice or hinder the government's investigation in order to form the basis of a section 3C1.1 enhancement. United States v. Baker, 894 F.2d 1083, 1084 (9th Cir. 1990). Further, "section 3C1.1 on its face encompasses `attempted' obstruction of justice as well as actual obstruction." Id. (citation omitted). Thus, the district court did not err in upwardly adjusting Bidegary's sentence under U.S.S.G. § 3CL.L.

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V.

Bidegary also argues that the district court should not have admitted for impeachment purposes evidence of his past criminal convictions. We review for an abuse of discretion the district court's evidentiary rulings under Federal Rule of Evidence 609(a). United States v Jimenez, 214 F.3d 1095, 1097-98 (9th Cir. 2000).

Bidegary contends that the district court abused its discretion by admitting evidence of the convictions without specifying the theory under which the evidence was admissible. Bidegary then argues that the evidence should only be examined under Rule 609(a)(1), not 609(a)(2), because the crimes did not involve dishonesty or false statements. Bidegary then asserts that because the prejudice of the convictions outweighs their probative value, and because the convictions are more than ten years old, the evidence should have been excluded.

Federal Rule of Evidence 609(a)(1) provides that evidence of prior convictions may be admitted if the crime was punishable by imprisonment in excess of one year and if the court determines that the probative value of the evidence outweighs its prejudicial effect. Fed. R. Evid. 609(a)(1). Federal Rule of Evidence 609(b) provides that a district court must balance the prejudicial and probative effects of the conviction if "more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." Fed. R. Evid. 609(b).

Contrary to Bidegary's contentions, the district court was not ambiguous about the theory under which it ruled the prior convictions admissible. Because the district court adopted the government's position, it must have ruled the embezzlement conviction admissible as a crime of dishonesty under Rule 609(a)(2), and the sale of security without a

permit conviction admissible as more probative than prejudicial under Rule 609(a)(1). The district court also adopted the government's position that the grand theft conviction was admissible under both 609(a)(1) and 609(a)(2).

We consider five factors "in balancing the probative value of a prior conviction against its prejudicial impact for purposes of Rule 609(a)(1)." United States v. Alexander, 48 Fad 1477, 1488 (9th Cir. 1995) (citation omitted). Considering the five factors and the descriptions of the prior crimes, the district court did not abuse its discretion in admitting evidence of Bidegary's convictions for grand theft and sale of a security without a permit. As described in the government's response to Bidegary's motion in limine, the prior offenses were indicative of dishonesty and deception, as they involved intentionally false representations and the failure to disclose important information about the "investment" plan. We conclude that the five factor test has been met. See id. Therefore, the district court did not abuse its discretion in admitting under Rule 609(a)(1) evidence of Bidegary's convictions for sale of a security without a permit and grand theft.

The district court also did not abuse its discretion in allowing evidence of Bidegary's embezzlement conviction under Rule 609(a)(2). Embezzlement is an enumerated crime of dishonesty under Rule 609(a)(2). See United States v. Ortega, 561 F.2d 803, 806 (9th Cit. 1977). The district court's ruling was not an abuse of discretion.

VI.

Bidegary argues that his conviction was not supported by sufficient evidence as to counts four, five, and six because the government failed in its burden of proving that he willfully violated the tax code. We review de novo claims of insufficient evidence. United States v. Antonakeas, 255 F.3d 714, 723 (9th Cir. 2001). There is sufficient evidence to

support a conviction if, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Bidegary argues that there was insufficient evidence to convict him on count six because the count is based solely on the improper claim of vehicle commuting mileage deductions, and the legality of these deductions was unclear. Although there was conflicting evidence on both the legality of the deduction and Bidegary's knowledge of the state of the law, a reasonable jury could have resolved the conflict in favor of the government, and a rational trier of fact could have found Bidegary's actions willful beyond a reasonable doubt. Therefore, there was sufficient evidence to support Bidegary's conviction on count six. This reasoning also dispenses with Bidegary's argument that there was insufficient evidence to support his conviction on count four, which was also based on the impropriety of deducting the commuting and vehicle expenses. There was sufficient evidence to support a finding that Bidegary knew commuting and tool hauling expenses were not deductible.

Finally, Bidegary challenges the sufficiency of the evidence as to count five, which charges the improper deductions of vehicle expenses and charitable contributions. Bidegary again argues the lack of sufficient evidence of willfulness to support his conviction. Even if the charitable contribution deductions were not improper, this count includes charges of improper vehicle expense deductions. There was evidence sufficient for a rational trier of fact to find that these improper vehicle deductions were willfully made. That is enough to support Bidegary's conviction on count five. Bidegary's challenges to the sufficiency of the evidence fail.

AFFIRMED.

EXHIBIT 2

NOT FOR PUBLICATION

FILED
April 29,2002
Cathy A. Catterson,
Clerk, U.S. Court of
Appeals

UNITED STATES OURT OF APPEALS
FOR THE NINTH CIRCUIT
District of Nevada, Reno

UNITED STATES OF AMERICA, Plaintiff-Appellee	No. 01-10293 D.C. No. CR-99-00006 DWH(RAM)
V.	
THOMAS M. BIDEGARY, Defendant - Appellant.	ORDER

Before: WALLACE, KOZINSKI and PAEZ, Circuit Judges

The panel as constituted above has voted to deny appellant's motion for extension of time to file a petition for rehearing and to grant an extension of time up to and including May 2, 2002, within which to file a suggestion for rehearing en banc.

EXHIBIT 3

NOT FOR PUBLICATION

FILED
June 14, 2002
Cathy A. Catterson,
Clerk, U.S. Court of
Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States Of America
Plaintiff - Appellee,

No. 01-10293
D.C. No.CR-99-0006-DWH(RAM)

V.

THOMAS M. BIDEGARY,
Defendant - Appellant.

ORDER

Before WALLACE, Circuit Judge

Defendant/Appellant's motion for leave to file a petition for rehearing en banc one day late, filed on May 10, 2002, is hereby GRANTED.

EXHIBIT 4

JUL 19, 2002

FILED
JULY 17,2002
Cathy A. Catterson, Clerk,
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee,	No. 01-10293 D.C. No.
V.	CR-99-00006
THOMAS M. BIDEGARY, Defendant - Appellant.	DWH(RAM)

ORDER

Before: WALLACE, KOZINSKI and PAEZ, Circuit Judges

The petition for rehearing and the petition for rehearing en banc are denied. Fed. R.App.P.35; Fed. R. App. P. 40.

EXHIBIT 5

Received
In Drop Box
US District Court
District of Nevada
FILED
Clerk of U.S. District Court

Donald Calvin Hill, Esq.
Nevada Bar No. 858
485 West Fifth St.
Reno, Nevada, 89503
(775) 323-7758
Attorney for Thomas Bidegary

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff

vs.

THOMAS V. Bidecary and
MARY ANN SHANNON,
Defendants.

CR-N-99-0006
DWH (RAM)
Proposed Jury
Instructions

"S/_____
Donald Calvin Hill, Esq. State Bar No. 858
485 W. Fifth Street , Reno, Nevada 895C3
(775) 523-7758
Attorney -or Thomas Bidegary

The Defendant, Thomas Bidegary has plead "Not Guilty" to the charges contained in all counts of the indictment. This

plea of not guilty put in issue each of the essential elements of the offense as described in these instructions and imposes on the government the burden of establishing each of these elements by proof beyond a reasonable doubt.

Defendant Thomas Bidegary moreover, contends that he is not guilty of the crimes charged because he prepared all tax returns in good faith, and based upon the information provided by the taxpayers.

Deavitt, Blackmer, Wolff and O'Malley, Federal Jury Practice and Instructions § 19.01 Instruction No.

To find the defendant guilty of violating Section 7206(2), you must not only find that he did the acts of which he stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully" as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntary and intentionally and with the specific intent to do something he knew the law prohibited, that is to say, with intent either to disobey or to disregard the law. It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" on "evil motive."

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what mother's intentions were in doing or not doing rhinos. With the knowledge of definite acts we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

The defendants conduct is not willful if he acted through negligence. gross inadvertence. careless disregard, justifiable excuse, mistake, or due to a good faith misunderstanding of the requirements of the law. Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions, (4*" Ed. 1992), Section 17.07 (modified and supplemented).
Instruction No.

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(h), I certify that 1 am an employee o_' Donald Calvin Hill, Esq., and that on this date 1 personally hand delivered at Reno, Nevada, a true copy of the attached document addressed to:
Christopher S. Romano, Esq. Anastasia M. Enos, Esq.
100 W. Liberty St., Ste. 600 Reno, NV 85501 July
Dated this 14th day of July, 2000.

"S/_____"
Linda Jones

EXHIBIT 6

Kathry Landreth, United States Attorney

Christopher J Romano / Anastasia M. Enos
Trial Attorneys - U.S. Department of Justice - Tax Division
P.O. Box 972, Washington, DC 20004
Telephone: (202) 5145684 - Facsimile:(202) 514-9623
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff,	Case No. CR-N- 006-D WH (RAM)
V.	
THOMAS M. BIDEGARY, And Mary Ann Shannon Defendants	GOVERNMENT'S OBJECTIONS TO JURY INSTRUCTIONS SUBMITTED BY DEFENDANTS BIDEGARY AND SHANNON

The Government, by and through counsel, submits the following objections to the jury instructions submitted by defendants Thomas M. Bidegary and Mary Ann Shannon.

The Government understands that the theory of defense instructions, Devitt, Blackmar Wolff, and O'Malley, *Federal Jury Practice and Instructions, § 19.01,* submitted by each defendant are not in their final form and are likely to be modified prior to the end of trial. The Government hereby reserves its right to object to them after receiving the final version of these instructions.

The Government objects to a portion of the jury

instruction on definition of willfulness, the mental intent element required for all the criminal tax offenses charged, which was tendered by defendant Bidegary. The instruction reads as follows:

To find the defendant not guilty of violating Section 7206(2), you must not only find that he did the acts of which he stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully" as used in this statute, means a voluntary, intentional violation of a known legal duty In other words. the defendant must have acted voluntarily and intentionally and with the specific intent to do something he knew the law prohibited, that is to say, with the intent to either disobey or disregard the law. It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive."

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his state of mind.

It is obviously impossible to ascertain or prove directly the operations of the defendant's mind, but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are and experience has taught us that frequently actions speak more loudly than words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

The defendant's conduct is not willful if he acted through negligence, gross inadvertence, careless disregard, justifiable excuse, mistake, or a good faith misunderstanding of the requirements of the law.

The Government objects to the phrases "gross inadvertence" and "careless disregard" in the final paragraph of this instruction. The unmodified version o£ the final sentence of this instruction can be found in the comments (Tenth Circuit) following §56.20 of Devitt. Blackmar, Wolff, and O'Malley, *Federal Jury Practice and Instructions.* This paragraph should read. "The defendant's conduct is not `willful' if he acted through negligence, inadvertence, or mistake, or due to his good faith misunderstanding of the requirements of the law."

Defendant's inclusion of the terms "gross inadvertence" and "careless disregard" are inappropriate additions. The tendered instruction indicates in the first paragraph that an intent to disobey or disregard the law is sufficient to show willfulness. Rather than clarifying the meaning of willfulness, the addition of these phrases is contradictory and confusing.

The Government is perfectly willing to agree to this instruction if those phrases are not included. In the alternative, the government has submitted a definition of willfulness instruction in its supplemental submission of contested jury instructions. That alternative instruction' contains the majority o£ the same language found in the instruction tendered by defendant Bidegary

The Government, therefore, respectfully requests this Court to give the above willfulness instructions without the phrases "gross inadvertence" and "reckless disregard" or the willfulness instruction tendered in the Government's supplemental jury instructions.

KATHRYN E. LANDRETH
United States Attorney
"

S/_____"
"ANASTASIA M. ENOS
CHRISTOPHER J. ROMANO Trial Attorneys
U.S. Department of Justice Tax Division

1 Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions, 1999 Supplement, Volume 2, Sections 21-69 (Seventh Circuit Note).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via facsimile and first class mail on this 7th day of July, 2000 as indicated below.

Donald Cavin Hill, Esquire
485 W. Fifth Street Reno, NV 89503
Telephone: (775) 323-7758 Fax (775) 323-5944-

Dean R. Heidrich, Esquire
485 W. Fifth Street, Reno, NV 89503
Telephone: (775) 324-2009 (775) 323-5944-Fax

EXHIBIT 7

FILED
NOV 16 2000
S/_____, Deputy
US DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff

vs.

THOMAS M. BIDEGARY. and
MARY ANN SHANNON.
Defendants.

CR-N-99-006-
DWH (RAM) .
JURY
INSTRUCTIONS

Members of the jury, now that you have heard all the evidence, it is my dun to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to yon. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes. opinions. prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. And you must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return--that is a matter entirely up to you.

JURY INSTRUCTION #1

The indictment is not evidence. The defendants are presumed to be innocent and do not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charge beyond a reasonable doubt. If it fails to do so. you must retum a not guilt' verdict as to that charge.

JURY INSTRUCTION # 2

The defendants have pleaded not guilty to the charges. Defendant Thomas M. Bidegary. moreover. contends that he is not guilty of the crimes charged because he prepared all tax returns in good faith and based upon the information provided by the taxpayers Defendant Mary Ann
Shannon contends that she is not guilty of the crimes charged against her because she is. in fact. an owner of the Paradise Valley Mercantile.

JURY INSTRUCTION # 3

At the beginning o£ trial. I described the charges against defendant Thomas M. Bidegary. Since that time, Counts 18, 19 and 20 are no longer before you.
The defendants are on trial only for the charges remaining in the indictment. Evidence presented can only be considered as it relates to those remaining counts.

JURY INSTRUCTION # 4

The defendants have testified. You should treat this testimony just as you would the testimony of any other witness.

JURY INSTRUCTION # 5

The evidence from which you are to decide what the facts are consists of: (1) the sworn testimonv of witnesses;
(2) the exhibits which have been received into evidence; and
(3) any facts to which all the lawyers have agreed or stipulated.

JURY INSTRUCTION # 6

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guiltv. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is tour duty to find the defendant not guilty. On the other hand. if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty

JURY INSTRUCTION # 7

In reaching your verdict you may consider only the testimony and exhibits received into evidence. Certain things are not evidence and you may not consider them in deciding what the facts are. I will list them for you:

I. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses What they have said in their opening statements, will say in their closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the v,ay the lawyers have stated them, your memory of them controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the question. the objection or the court's ruling on it.

3. Testimony that has been excluded or stricken. or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction. you must follow it.

4. Anything yon may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

JURY IN INSTRUCTION # 8

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

JURY INSTRUCTION # 9

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimonv of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear. or know the things testified to: the witness's s memory; the witness's manner while testifying;

4. interest in the outcome of the case and any bias or prejudice;

5. whether other evidence contradicted the witness's testimony:

6. the reasonableness of the witness's testimonv in hunt of all the evidence: and

7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

JURY INSTRUCTION #10

You are here only to determine whether each defendant is guilty or not guilty of the charges in the indictment. Your determination must be made only from the evidence in the case. The defendants are not on trial for any conduct or offense not charged in the indictment. You should consider evidence about the acts, statements. and intentions of others. or evidence about other acts of any defendants. only as they relate to the charge against that defendant.

JURY INSTRUCTION # 11

The defendants are not on trial for any act or any conduct not specifically charged in the indictment.

JURY INSTRUCTION # 12

Although the defendants are being tried together you must give separate consideration to each defendant. In doing so you must determine what the evidence in this case shows with respect to each defendant, leaving out of consideration any evidence admitted solely against mother defendant. The fact that you may find one of the defendants guilty, or not guilty should not control your verdict as to the other defendant.

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

JURY INSTRUCTION # 13

As I sad previously, some evidence has been admitted for a limited purpose only. When I have instructed you that an item of evidence was admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

JURY INSTRUCTION # 14

You have heard testimony that the defendant made a statement. It is for you to decide (l) whether the defendant made the statement and (2) if so, how much weight to give to it. In making those decisions, you should consider all of the evidence about the statement, including the circumstances under which the defendant may have made it.

JURY INSTRUCTION # 15

You have heard evidence of an uncharged act engaged in by the defendant Thomas M. Bidegary, as testified to by undercover Agent Stephen Boyd. You may consider that evidence only as it bears on the defendant s intent, knowledge, absence of mistake or accident and for no other purpose.

JURY IN INSTRUCTION # 16

You have heard evidence that defendant Thomas M. Bidegary has previously been convicted of a crime. You may consider that evidence only as it may affect defendant's believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.

JURY INSTRUCTION # 17

You have heard testimony from Juanita Kennedy, a witness who has received immunity. That testimony was given in exchange for a promise by the government that such testimony will not be used in any federal or state case against her.

In evaluating Juanita Kennedy's testimony. you should consider whether that testimony may have been influenced by the government's promise of immunity given in exchange for it, and you should consider that testimony with greater caution than that of ordinary witnesses

JURY INSTRUCTION # 18

You have heard testimony from an undercover agent who was involved in the government's investigation in this case. Law enforcement officials are not precluded from engaging in stealth and deception. such as the use of informants and undercover agents. in order to apprehend persons engaged in criminal activities. Undercover agents and informants may properly make use of false names and appearances. The government may utilize a broad range of schemes and ploys in the course of investigations

JURY INSTRUCTION 19

You have heard testimony from persons who. because of education or experience, are permitte to state opinions and the reasons for their opinions. Testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education an experience, the reasons given for the opinion, and all the other evidence in the case.

JURY INSTRUCTION # 20

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books. records, and other documents which are in evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case. you should disregard these charts and summaries and determine the facts from the underlying evidence.

JURY INSTRUCTION # 21

Certain charts and summaries have been received into

evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

JURY INSTRUCTION # 22

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However. nothing' that I have said or done is intended to suggest what your verdict should be -- that is entirely for you to decide.

JURY INSTRUCTION # 23

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Votes are only to assist vour memory. You should not be overly influenced by the notes.

JURY INSTRUCTION # 24

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

JURY INSTRUCTION # 25

While you are to consider only the evidence in the case, in your consideration of that evidence You are not limited to the bald statements of the witnesses. In other words. You are

not limited solely to what you see and hear as the witnesses testify. You are permitted to draw from facts which you find have been proved such reasonable inferences as seem justified in the light of Your experience. Inferences are simply deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

JURY INSTRUCTION # 26

Counts 1-17, Count 21 and Counts 23-25 of the Indictment charge that Thomas M. Bidegary did willfully aid and assist in. and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service. of a United States Individual Income Tax Return. Form 1040 for several individuals for tax years 1992, 1993. 1994, 1995. 1996, and 1997 which were false and fraudulent as to a material matter. The charges are in violation of Title 26, United States Code, Section 7206(2). The statute provides in part:

Any person who. .. willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under ...the Internal Revenue laws. of a return ... or other document which is fraudulent or is false as to any material matter. whether or not such falisfy or fraud is with the knowledge or consent of the person authorized or required to present such return or document shall be guilty of an offense against the United States.

JURY INSTRUCTION # 27

In order for the defendant to be found guilty of the charges in counts 1-17. 21 and 23-25 of the Indictment, the government must prove each of the following elements beyond a reasonable doubt: First. the defendant. Thomas M.

Bidegary willfully aided. assisted or advised a person in the preparation of an income tax return that was false or fraudulent: and

Second. the return was false or fraudulent as to something necessary to a determination of whether income tax was owed.

A person acts "willfully' by voluntarily and intentionally assisting or advising another to do something that the person knows disobeys or disregards the law.

The government is not required to prove that the taxpayer knew that the return was false.

JURY INSTRUCTION # 28

Concerning the second element. the Government must prove that the return was false or fraudulent as to a material matter.

A "false" tax return is a return that was untrue when made, or which is known to be untrue by the person making it. or by the person causing it to be made.

A "fraudulent" tax return is a return made or caused to be made with the intent to deceive. Generally, an item on a tax return is material if it has the natural tendency to influence or impede the IRS in determining or ascertaining the correctness of the tax declared on the return or in verifying or auditing the returns of a taxpayer.

Counts 1-17. 22 and 23-25 of the indictment allege that each tax return was false or fraudulent in one or more of the ways specified in each count of the indictment.

It is not necessary for the government to prove that the income was understated or overstated. or that the

deductions or credits were overstated in the exact amounts alleged. It is necessary only that the government prove beyond a reasonable doubt that the income was understated or overstated, or the deductions and credits were overstated, by some substantial amount. as alleged in the indictment.

It is not necessary that the Government be deprived of any tax by reasons of the filing of the return, or that it even be shown that additional tax is due to the Government. only that the Defendant wilfully aided and assisted in the preparation of a materially false return.

Further. where the government has alleged more than one materially false or fraudulent item for a return, it is not necessary that the government prove that every item was false or fraudulent. For each return. it is sufficient if the government proves one materially false or fraudulent item as charged in the indictment. However. you must unanimously agree to that false item.

JURY INSTRUCTION # 29

Counts 22 and 26-29 of the Indictment charge violations of Title 26, United States Code Section 7206(1). The statute provides in part:

"Anv person who -- willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury. and which he or she does not believe to be true and correct as to every material matter . . ." be guilty. of an offense against the United States.

JURY INSTRUCTION #30

Defendant Thomas M. Bidegary is charged in count 22 and defendant Mary Ann Shannon charged in counts 26-29 of the Indictment with making and subscribing a false

income tax recur violation of 26 U.S.C. § 7206(1). In order for each defendant to be found guilty of the charges. government must prove each of the following elements beyond a reasonable doubt:

First. the defendant made and subscribed a return filed with Internal Revenue Service that incorrect as to a material matter:

Second, that the return contained a written declaration that it was made under the penalty perjury and

Third. that the defendant did not believe the return to be true and correct as to the material m: or matters charged in the Indictment.

Fourth that the defendant filing the tax return acted willfully.

JURY INSTRUCTION # 31

Generally, an item on a tae return is material if it has the natural tendency to influence or impede he IRS in determining or ascertaining the correctness of the tae declared on the return or in verifying >r auditing the returns of a taxpayer.

JURY INSTRUCTION # 32

An act is done willfully if done voluntarily and intentionally with the purpose of violat known legal duty.

JURY IN STRUCTION # 33

The word "subscribe" simply means the signing of one's

name to a document. "The fact that an individual's name is signed to a return ... shall be prima facie evidence for all purposes that the return . . . was actually signed by him." which is to say that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it.

If you find beyond a reasonable doubt from the evidence in the case that the defendant sit .he tax return in question. then you may also draw the inference and may also find, but are not required to find, that the defendant knew of the contents of the return that the defendant signed

JURY INSTRUCTION #34

The government is not required to prove there was an additional tax due and owing for ar the tax returns in question. Whether the government has or has not suffered any monetary loss result of the defendants conduct is not a question you must decide.

JURY INSTRUCTION # 35

Count 30 of the Indictment charges the defendant Thomas M. Bidegary with a violation of T 8. United States Code. Section 641.

641 of Title I S of the United States Code provides, in part. as follows:

"Whoever knowingly converts to his use or the use of another

or without author sells, conveys or disposes of any . . ., money,

or thing of value of the United States or any department or

agency thereof, or any property made or being made — under

court for the United States or any department or agency thereof; or receives. conceals. or retains the same with intent

to convert it to his use gain, knowing it to have been ... converted--" shall be guilty of an offense against laws of the United States.

JURY INSTRUCTION # 36

In order for defendant Thomas M. Bidegaryto be found guilty, of the charge alleged in Cow of the Indictment, the government must prove each of the following elements beyond a reasonable do First. the defendant_ Thomas M. Bidegarv, knowingly converted to his own use or the m another money or a thing of value with the intention of depriving the owner of the use or benefit o money or thing of value;

Second, the money or thing of value belonged to the United States: and Third, the value of the money or thing was more than 51,000.

JURY INSTRUCTION # 37

Conversion is the deliberate taking or retaining of the money or "thing of value" with the it to deprive the owner of its use or benefit either temporarily or permanently. Conversion include: in an unauthorized manner or to an unauthorized extent.

JURY INSTRUCTION # 38

A United States Treasury Check is a "thing of value" within the meaning of Section 641.

JURY INSTRUCTION # 39

The government must prove beyond a reasonable doubt that the defendant, Thomas M. Bides rcted know ingly and with the intent to appropriate the money or 'thing of value" to a use inconsistent with the owner's rights and benefits. An act is done knowingly if the defendant is aware of the act foes not act or fail to act through ignorance. mistake or accident. The government is not require prove e that the defendant knew that his acts or omissions were unlawful. You may consider evident the defendant's words acts. or omissions. along with all the other evidence in deciding whether defendant acted knowingly.

JURY INSTRUCTION #40

To satisfy the third element, the government must produce evidence that the money or "thi value" was in excess of $1,000,

JURY INSTRUCTION # 41

The intent of a person or the knowledgc that a person possesses at any given time ma: ordinarily be proved directly because there is no way o£ directly scrutinizing the workings of the ht mind. In determining the issue of what a person knew or what a person intended at a particular time you may consider any statements made or acts done by that

person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent. You map infer. but you are certainly not required to infer. that a person intends the nature probable consequences of acts knowingly done. It is entirely up to you, however. to decide what to find from the evidence received during this trial.

JURY INSTRUCTION # 42

The Indictment charges that the offense was committed "on or about" certain dates. Althc .he evidence need not establish with certainty the exact date of the alleged offense. it must establish the offense was committed on a date reasonably near the date charged.

JURY INSTRUCTION # 43

Any willful failure to comply with the requirements of the Internal Revenue Code for me year is a separate matter from any such failure to comply for a different year. The tax obligations of the defendant in any one year must be determined separately from the tax obligations in any other ear.

JURY INSTRUCTION # 44

When you begin your deliberations. you should elect one member of the jury as your foreperson That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty. must be unanimous.

Each of you must decide the case for yourself. but you should do so only after you have considered all the evidence, discussed it fully with the other jurors. and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

JURY INSTRUCTION # 45

If it becomes necessary during your deliberations to communicate with me, you may send a note through the Marshall. signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing, or here in open court. If you send out a question. I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone--including me--how The jurv stands, numerically or otherwise. on the question of the guilt of the defendant. until after you have reached a unanimous verdict or have been discharged.

JURY INSTRUCTION # 46

After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been

given to you, sign and date it and advise the Marshall outside pour door that you are ready to return to the courtroom.

JURY INSTRUCTION # 47

GIVEN IN OPEN COURT this 16th day of November, 2000.

UNITED STATES DISTRICT JUDGE

EXHIBIT 8

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BEFORE THE HONORABLE
DAVID W. HAGEN, DISTRICT JUDGE

UNITED STATES OF AMERICA,
Plaintiff,

-vs

THOMAS BIDEGARY and
MARY ANN SHANNON,
Defendants. .

No. CR-N-00-5-
DWH(RAM)
November 15, 2000
Reno, Nevada

Volume VIII
TRANSCRIPT
OF JURY TRIAL

APPEARANCES

FOR THE GOVERNMENT:

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FOR THE DEFENDANT BIDEGARY:

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FOR THE DEFENDANT SHANNON:

DEAN R. HEIDRICH Attorney at Law Reno, Nevada

Reported by:

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Let me ask first the Government, what did you learn, if anything, in respect of Exhibit 18?

MR. ROMANO: Your Honor, my understanding is that the file was received. In fact it's over at the office, and I've just asked Revenue Agent Braithwaite to go retrieve the file. But there is -- the original file does not contain any note or any indication from Mr. Bidegary with regard to Mr. Frazier, and we'll certainly have that file here in due course.

THE COURT: No, I'll take your representation on that.

Well, I've determined that Rule 1003 does not forbid the admissibility of Exhibit Number 18, and Rule 1004(2) would appear to allow it, and therefore, for whatever it's worth, Exhibit 18 will be in evidence in this case. (Defendant's Exhibit 18 was received in evidence.)

THE COURT: Now, if the attorneys will please bear with me, we're going to have a set of jury instructions in their current iteration coming out in a couple of minutes.

I'd like you to take those and look them over for about a half hour or so, and then I'll put on the record any objections that you have to the instructions that are being given and any objections you have in respect of instructions you may have requested that are not being given.

So if you would please sort of hang loose here for a little while, we'll get you sets of instructions as soon as we can, and then in about a half hour after that, we'll go on the record with those objections. We're in recess.

MR. HEIDRICH: Judge, do you expect the clients to be here?

THE COURT: They don't have to be, no.

MR. HEIDRICH: Thank you.

(A recess was taken.)

THE COURT: All right. Let's go on the record..

Beginning with the Government, have you had an opportunity to go over the instructions?

MS. ENOS: Yes, your Honor.

THE COURT: Do you have any objections to any of the instructions that are being given?

MS. ENOS: Yes, actuallv.

The objections come in the format of proposed changes to certain of the instructions.

THE COURT: Okay. Let's start from the first in order.

MS. ENOS: Okay. The first instruction that we have proposed changes to is instruction number 26.

THE COURT: Twenty-six. Okay.

MS. ENOS: The changes to this instruction are almost all clerical, your Honor. Starting from the beginning, Counts 1 through 17, 21 and 23 through 25 of the Indictment "charge," just a real simple correction.

THE COURT: Oh, charge, yes, good.

MS. ENOS: Skipping down to the fourth line?

THE COURT: Yes.

MS. ENOS: Individual tax years for 92, '93, '94, '95, '96 and '97. The '98 return was disposed of in one of the three counts.

THE COURT: That's right. Okay.

MS. ENOS: Then with regard to the text statute, going down to the fourth line, "to any material matters, whether or not such falsity or fraud," is part of the statute.

THE COURT: All right.

MS ENOS: And then the other addition is on the fifth line where it says "or consent of the person."

THE COURT: All right. Okay. Those corrections will be made to jury instruction 26.

MS. ENOS: We have comments with regard -- or

objections with regard to jury instruction number 27.

THE COURT: All right.

MS. ENOS: With regard to the first element, first, Defendant Thomas M. Bidegary, willfully, we believe, aided, assisted, or advised. We need to add the word "aided."

THE COURT: Right.

MS. ENOS: "A person in the preparation of an income tax return that was false." And then in order to make it match jury instruction number 26, we believe "or fraudulent" should be added after false.

THE COURT: "False or fraudulent." All right.

MS. ENOS: And then with regard to the second element, your Honor, it states that the return was false, again, we need to add "or fraudulent." Then we have, "or something necessary to a determination of whether income tax was owed."

We object to the remainder of the sentence with regard to the second element because -- well, two reasons. One is because the return was false or fraudulent as to a material matter, and if the Court wants to define a material matter, the way it's defined here implies an additional element which is not part of the offense. It implies that there is a requirement of a tax deficiency or tax owed, rather, materiality is something that is necessary to the correct computation or determination of tax, not necessarily that an income tax was owed.

THE COURT: All right. Now, you are objecting to the language set forth in lines 7 and 8?
Or are you objecting to the language set forth in the second element?

MS. ENOS: The language set forth in the end of line 5 and line 6, so it's up to -- up to, "second, the return was false or fraudulent as to," we're not objecting to. The remaining language of the second element we are objecting to.

THE COURT: All right, and you would substitute for that language the word materiality?

MS. ENOS: "A material matter."

THE COURT: Something necessary to the determination of whether income tax was owed would be a material matter.
But are you saying that it doesn't embrace the universe of material matters?

MS. ENOS: That's correct. The language here is stating that a material matter is a determination of whether tax is owed.

Rather, a material matter is something that is necessary to a correct computation or determination of tax, not necessarily that a tax was owed because, in fact, a tax due and owing is not an element of this offense.

THE COURT: All right. We'll take a look at that on instruction 27. Let's go to the next one.

MS. ENOS: Okay. That's it for 27. The only other comment I have with regard to that is that that would make this consistent with jury instruction number 30 which is relating to 061, the other tax fraud charge with regard to material matter.

THE COURT: Okay.

MS. ENOS: We have just small corrections with regard to jury instruction number 28.

THE COURT: Okay.

MS. ENOS: On line 6, "generally an item on a tax return" as opposed to "returns."

THE COURT: Right.

MS. ENOS: Then if you go down to line 11

THE COURT: Okay.

MS. ENOS: "It is not necessary for the Government to prove that the income was understated or," in this case we believe "overstated" is appropriate, both there and on line 13.

THE COURT: So that you wish it to read, "It is not necessary for the Government to prove that the income was understated or overstated"?

MS. ENOS: Correct.

THE COURT: "Or that the deductions or credits were understated or overstated," or -

MS. ENOS: Well, yeah, just where we were talking about income.

THE COURT: Okay.

MS. ENOS: And the same correction with regard to line 13.

THE COURT: And that's in relation to the earned income -

MS. ENOS: "Reasonable doubt that the income was understated or overstated."

THE COURT: Yes. Okay.

MS. ENOS: Our next objection, your Honor, is with regard to jury instruction number 35.

THE COURT: Okay.

MS. ENOS: The elements here, on line 4 it states, "That the defendant, Thomas M. Bidegary, knowingly stole money or a thing of value." We're objecting to having "stole" in there. The defendant is actually charged with converting to his own use, or the use of another, and we believe that the phrase "converted to his own use, or the use of another" needs to be inserted.

MR. HILL: So it would be "stole or converted"?

MS. ENOS: Actually, we object to "st le" being in there, because, rather, the Indictment charges Mr. Bidegary with conversion to his own use, or the use of another.

THE COURT: So instead of "stole," "converting to his own use, or the use of another, money or a thing of value"?

MS. ENOS: Yes. THE COURT: Okay.

MS. ENOS: And that is it for objections to the instructions that have been provided by the Court.

In addition, we'd request or object to the lack of inclusion of a definition of conversion.

THE COURT: Okay.

MS. ENOS: In the Government's supplemental jury instructions, we have conversion defined that we've submitted to the Court. I've got copy.

THE COURT: Well, we've got our copies. MS. ENOS: Okay. THE COURT: Okay.

MS. ENOS: In addition, we would object to the lack of inclusion, or we'd request to be included the jury instruction related to commission of a crime which specifically states that although -- or the fact that the Government could proceed civilly rather than criminally and that the Government could take civil action against the defendants is not relevant to the issue of criminal liability.

Because the defendant has, in fact, put this in issue in the course of their defense case, we believe that this jury instruction is appropriate.

THE COURT: I see. All right.

MS. ENOS: And that's all of our objections. THE COURT: Is that it?

MS. ENOS: Yes.

THE COURT: All right. Let's hear first from Mr. Heidrich.

MR. HEIDRICH: Your Honor, if you would like, I can go through them and he can add -- there's only a couple of them that we have problems with individually, but whatever.

THE COURT: Okay.

MR. HEIDRICH: Your Honor, first of all, materiality is defined in instruction number 28, and it's the paragraph that starts at line 6. But instruction number 28 is directly related to instruction number 27 which only addresses the Counts 1 through 17, 21 and 23 through 25.

THE COURT: Yes.

MR. HEIDRICH: And then you get to Mrs. Shannon's -- the instruction relative to her is instruction number 29, and then instruction 30 defines the elements of that statute.

THE COURT: Yes.

MR. HEIDRICH: And then the paragraph which is numbered third at line 9 says, "Third, the defendant did not believe the return to be true and correct as to the material matter or matters charged in the Indictment."

I don't know if it makes that much difference, but what I'm saying is that materiality is defined only as it relates technically under these instructions to all counts except for those involving Mrs. Shannon. There's no following definition -

THE COURT: So, in other words, there is no definition of materiality to assist the jury in respect of Counts 26 through 29.

MR. HEIDRICH: Exactly. THE COURT: Okay.

MR. HEIDRICH: I also believe, Judge, we have a joint request to add some language to the willfulness instruction.

THE COURT: Okay. Would you give me that number?

MR. HEIDRICH: If I could find it. THE COURT: Are you talking about 31?

MR. HEIDRICH: Yes. Well, there's also another one, I believe.

THE COURT: There's another one, the Ninth Circuit one is in. And, Ms. Hcurigan, what one is that Ninth Circuit willful -

MS. HOURIGAN: The Ninth Circuit is 31, and it's also-

THE COURT: That is the Ninth Circuit. All right.

MS. HOURIGAN: And it is in number 27 as well. THE

COURT: Twenty-seven. Thanks. All right. The Ninth Circuit instruction in 31 is given for that reason in preference to the others that were submitted, and also there's a definition of willfully in instruction 27.

MR. HEIDRICH: Judge, I think that the language we would like to include stems from the Claiborne case, a Ninth Circuit case, 1985, and in that opinion, and I'll quote,

"The Court observed, quote, proof of willfulness is essential to support a conviction under 7206(1), and neither a careless disregard, nor gross negligence in signing a tax return will suffice."

THE COURT: Well, that may be the language of the Claiborne case, but that doesn't trump the Ninth Circuit Jury Instruction Committee's recommendation.

There isn't any -- I didn't detect that there was any kind of a point made by the defense that they were merely negligent and that willful doesn't include negligence.

But let's -- if that's important, let's -- why don't you read that language from Claiborne to me again.

MR. HEIDRICH: Sure.

"Proof of willfulness is essential to support a conviction under 7206(1), and neither a careless disregard, nor gross negligence in signing a tax return will suffice."

THE COURT: Now, in that case, of course, Judge Claiborne was the taxpayer, he was not the preparer.

MR. HEIDRICH: And, Judge, my concern is, on behalf of Mrs. Shannon, she is the taxpayer for the years '93, 4, 5 and 6, and I'm concerned that the Government may attempt to argue that simply classifying this as a -

THE COURT: Would you give me the cite and the

page?

MR. HEIDRICH: It's 765 F.2d, 788.

THE COURT: At?

MR. HEIDRICH: Well, 784 at 788.

THE COURT: All right. Let me take a look at that. I was thinking that after the words "legal duty" to the possibility of adding "and either a careless disregard or gross negligence," et cetera, et cetera, toward the end of that -- after the legal duty to end up that sentence. Would the Government have any objection if those words were added?

MS. ENOS: Your Honor, the Government does not have a problem with the Ninth Circuit instruction as it stands. We do object to the addition of that language.

THE COURT: Okay.

MS. ENOS: But the Ninth Circuit has approved of this language and it's been used.

THE COURT: All right. We'll look at it. Everybody's objections are on the record, so however it comes out -

MR. HILL: May I add something here, your Honor?

THE COURT: You certainly may. MR. HILL: Thank you. Regarding that particular instruction, we previously had agreed to an instruction on willfulness which the Government decided against, which is their right, but it is included in my packet which was filed July 14th, 2000.

THE COURT: You mean you have an instruction that the Government has agreed with you on?

MR. HILL: Well, they agreed to me originally, but then they changed their mind, so -- that's fine.

But it is a one-page instruction that did include that language, and it also applied to Section 7206(2), and it's a more comprehensive definition of willfully.

I know that you have it because it's stamped here. THE

COURT: Yes, I know we have it.

MR. HILL: And it goes on at the bottom to

say -- it includes that language and I think is a little bit more thorough. It says, the last paragraph,

"The defendant's conduct is not willful if he acted with negligence, gross inadvertence, careless disregard, justifiable excuse, mistake, or due to a good faith misunderstanding of the requirements of the law."

THE COURT: Yes, that -- well, your objection is on the record.

Yes?

MS. ENOS: Your Honor, with regard to the statements that Mr. Hill has made, in the course of the discussion, in attempting to agree to jury instructions, he is stating a correct face, that at first, when I first saw this instruction with the gross inadvertence and careless disregard, I did not initially see that.

However, when I read it carefully, I did disagree with that.

So it's not in the agreed-upon instructions because I read carefully and said to him I do not agree with that. THE COURT: Sure. I understand.

MS.

ENOS: In addition, we have submitted to the Court the Government's objections to the jury instructions submitted by the defendant with this language.

Now, the language that he's talking about initially came out of Devitt, Blackmar, Wolffe & O'Malley, and the language at the end of that paragraph reads,

"The defendant's conduct is not willful if he acted through negligence, inadvertence or mistake, or due to his good faith misunderstanding of the requirements of the law."

THE COURT: Uh-huh.

MS. ENOS: Now, the language that they're asking to include from Claiborne is gross inadvertence and careless disregard.

Well, those two phrases are contradictory and confusing compared to the approved language of Devitt, Blackmar, Wolffe & O'Malley, and certainly are not included or contemplated in the Ninth Circuit instruction.

THE COURT: Right.

MS. ENOS: And that is our objection to the inclusion of those phrases.

THE COURT: Yes.

There comes a moment in time where you stop telling the jury what the English language means and just use English.

And so, you know, if you say red does not include green after you've given an instruction that says if you find red, then you must find X, the jury knows what red is, and it's unnecessary to exclude for them all of the things that red isn't.

And this strikes me -- what's been requested here, Mr. Heidrich and Mr. Hill, strikes me as -- trying to tell the jury what is not included in the word intentionally seems somewhat like attempting to define the English language for the jury.

But we'll take a look at this and decide. Your objections are on the record.

Let's go to the next one, Mr. Heidrich.

MR. HEIDRICH: Judge, I have no other objections to the instructions as the Court has provided them. I would, however, ask that the Court or object to the Court's failure to include the defense theory of the defense instruction.

THE COURT: Which is?

MR. HEIDRICH: Which is -- I just had it here. We submitted it, your Honor, under proposed instructions, and it read -- I don't know what I did with it. I just had it in my hand. Here it is, your Honor. "The defendant, Mary Ann Shannon, has pled not guilty to the charges contained in counts 26 through 29 of the Indictment. Her pleas of not guilty put in issue each of the essential elements of the offenses as described in these instructions, and imposes on the Government the burden of establishing each of these elements by proof beyond a reasonable doubt. Defendant Mary Ann Shannon, moreover, contends she is not guilty of the crimes charged because she is, in fact, an owner of the Paradise Valley Mercantile."

ntained in that last sentence.

MR. HEIDRICH: Yes.

THE COURT: Well, we'll take a look at that. MR.

HEIDRICH: That's all I have, your Honor.

THE COURT: All right. Mr. Hill, anything more?

MR. HILL: Yes, just briefly. I'll go through these in order. Jury instruction number 3, it becomes somewhat confusing. I prefer that Counts 18, 19 and 20 have been "dismissed." "Disposed of" leaves some doubt in somebody's mind that maybe my client pled guilty to them.

THE COURT: That's a good point.

MR. HILL: And so "disposed of" just doesn't -doesn't take care of it adequately I don't think.

THE COURT: Why don't we just say that Counts 18, 19 and 20 are no longer before you.

MR. HILL: Okay.

MS. ENOS: I have no objection to that.

MR. HILL: I would prefer "dismissed" because I think that -- well, that's the truth, that's what happened, and I think it is appropriate in this case to say "dismissed."

THE COURT: Well -

MR. HILL: However, just to bring up one thing, you do have jury instructions that now go through 1 through 27 -- verdict forms 1 through 27 and no longer include Counts 18, 19 and 20 as they were originally written but now have new 18, 19 and 20s.

THE COURT: Did we renumber? I didn't realize that was -

MR. HILL: You did. THE COURT: Well -

MR. HEIDRICH: Judge, what Mr. Hill is saying is that on the verdict form you have twenty-seven entries for -- and the jury is going to have to read this very closely because **didn't renumber the counts of the Indictment.**

MR. HEIDRICH: No, he didn't -- he misspoke when he said renumbered the counts of the Indictment.

MR. HILL: Well, the verdict forms are

renumbered.

MR. HEIDRICH: Well, what has happened here -

THE COURT: Do you want to change it from numbers to the alphabet? No, we don't have enough letters in the alphabet, do we?

That's -- numbering is just numbering, it doesn't have anything to do with counts.

MR. HILL: Okay.

THE COURT: I tell what you we can do, though, I was going to think of writing out the numbers like o-n-e, and t-w-o and all of that. That gets cumbersome, too.

MR. HILL: Well, I don't have a problem with that part of the verdict form. I don't care the way it's done.

THE COURT: We'll just leave it the way it is, at least for purposes of that objection.

Do you have another one?

MR. HILL: Yes, your Honor. I submitted specific jury verdict forms.

THE COURT: Yes, that looks sort of like the Palm Beach ballot to me.

MR.

HILL: Yeah, and the Palm Beach ballot we still don't know what happened on, but I have a feeling I know, just like you do. The reason I'm raising that issue, and just so I may for the record, your Honor, is in Apprendi they have language -- which is a United States Supreme Court case that I'm sure you're familiar with -- language to the fact that, "Other than the fact of a prior conviction, any fact that

increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. "With taat exception, we endorse the statement of the rule set forth on the concurring opinions in this case, it is unconstitutional for a legislature to remove from the jury the assessment of the facts that increase the prescribed range of penalties to which a criminal defendant is exposed" -

THE COURT: I understand Justice Stevens' remarks, but but tell me how that applies to this telephone book verdict form.

MR. HILL: The telephone book verdict form specifically specifically gives the jury an opportunity to find my client guilty or not guilty of the individual sections of each Indictment where they have $5,200 charged in the first part A, they have 5,900 charged in part B, and they have $80 charged in part C. They did not choose to make them individual counts so it could result in a skewing of any sentencing.

THE COURT: Beyond a statutory maximum?

MR. HILL: The statutory maximum, as I interpret it, is is now the sentencing guidelines. The sentencing guidelines

THE COURT: Oh, I understand. I understand what you're saying. It's -- well, that's -- that's going to be one of the interesting things the Supreme Court will take up in respect of the sixteen-level enhancement for returning to the United States without permission after being deported following a conviction of an aggravated felony.

But I don't think that a jury finding a defendant guilty of any one of these counts without having also at the same time defined a number of facts yes or no in a special verdict form results in providing for a sentence beyond the statutory maximum, and I don't think that's implicated here. If you can point to something in the statute that tells me it is, then I'll consider it.

MR. HILL: My other point -- well, quite obviously there could be -- I don't know exactly what the potential penalty is if they find -- say that my client is guilty of a count without -- and this Court decides to add up all the money in each count regardless of whether the jury found by client guilty of an eighty-dollar noncash charitable contribution, or a -- the other that adds up to $11,000. It is significant as far as the impact to my client as to whether he is found guilty of part A, part B or part C as far as the sentencing guidelines. And that's the reason I think we have a right to have the jury find him guilty or not guilty of this A, B or C. THE COURT: Well, the guidelines are the creature of a commission appointed by or established by Congress.
If the Congress has provided for a statutory maximum sentence, I don't think that the application of the guidelines can be permitted to exceed that statutory maximum on a finding of guilt on any particular count.

MR. HILL: Not on any particular count, but the aggregate of the counts.

THE COURT: Well, the aggregate of the counts, the grouping rules still -- the grouping rules under the guidelines still would not be permitted to result in a sentence that's.above the statutory maximum.

MR. HILL: That's my argument, your Honor. But the one thing that I do want to point out is that we're going to -- if my client should get convicted of any one or more of these counts, we're then left with uncertainty as to what the jury actually found my client guilty of as far as dollar amounts in that particular count or any number of counts.

THE COURT: Well, dollar amounts certainly are taken into account in the guidelines for the determination of an offense level. But whatever the -- let's assume there was a conviction, whatever which the probation office does with respect to recommending to the Court dollar amounts and

therefore an applicable offense level, still, in that event, it would be impossible for me to sentence a defendant above the statutory maximum. If there were something within one of those counts that the jury would have to -- that the jury could find or not find, and you wouldn't know it based upon a simple verdict, that would result in the sentence being above the statutory maximum, then your argument makes sense. But so long as we're not dealing with a statutory maximum here, in other words, so long as we're not breaching a statutory maximum potentially by the application of the guidelines if there's a conviction, then Apprendi doesn't apply.

MR. HILL: Okay. That's my argument on Apprendi. I still think we should give this question to the jury because it will make determination of sentencing guidelines significantly easier for all of us in the event that it happens.

THE COURT: Well, I want us to -- if there happens to be a conviction in this case, I want us all to work really hard with the guidelines, and so, no, I'm not going to give that complicated jury form to the jury.

MR. HILL: I have already made my record concerning willfulness. I submitted another good faith edition out of Devitt and Blackmar and O'Malley, I submitted that this morning. THE COURT: Yes.

MR. HILL: And the other good faith, apparently, I decided was rejected by the Court, and I decided to submit this ore as I did not see it in the original packet. I think that this is appropriate under a good faith and the defense theory of the case, and, if you wish, I'll read it, but it did come in this morning.

THE COURT: Why don't you read it into the record as part of your objection so there's no mistake. MR. HILL: It's

Devitt and Blackmar Fifth Edition.

THE COURT: Yes. It's a pretty short instruction, so why don't you just go ahead and read it.

MR. HILL: Yes, Fifth Edition, nineteen 0 six. "A defendant does not act willfully if he or she believes in good faith" -

I submitted "he and she" because I originally talked to Mr. Heidrich about it being submitted on his behalf, too. "If he or she believes in good faith that he or she is acting within the law, or that his or her actions comply with the law. Therefore, if the defendant actually believed that what he or she was doing was in accord with the tax statutes, he cannot be said to have had criminal intent to willfully make a false statement on a tax return. This is so even if the defendant's belief is not objectively reasonable as long as he held the belief in good faith. However, you may consider the reasonableness of the defendant's belief, together with all the other evidence in the case in determining whether the defendant held the good faith belief."

THE COURT: You know, once again, it gets -the jury will understand what intentionally for the purpose of violating a known legal duty means. If you're acting in good faith, you're not acting intentionally for the purpose of violating a known legal duty. So that's the reason that I opted for the Ninth Circuit willfully instruction. I'm still going to go take a look at the Claiborne matter that Mr. Heidrich brought up and to which the Government objects, but the chances are that, as far as we're going to be going on this one is already in the form of instruction 31.

Do you have anything else?

MR. HILL: Yes. Instruction 15 begins with "You have heard evidence of an uncharged wrongful act." I think the appropriate language should be "uncharged act" rather than a comment from the Court as to whether it was wrongful or not.

THE COURT: That's a good point. Yes. That's a good point. The Court should not be, in its instructions, prejudging the effect of any of the evidence. Anything else?

MR. HILL: Instruction number 28, the bottom paragraph goes on -- the very last paragraph which is two lines long -

THE COURT: "For each return" ?

MR. HILL: Yes. It does -- it says, "For each return, it is sufficient if the Government proves one materially false or fraudulent item." And it should also say "as charged in the Indictment."

THE COURT: Yes, good point.

MR. HILL: So we don't open it up to other uncharged matters.

THE COURT: All right.

MR. HILL: And that should take care of it, your Honor.

THE COURT: All right. All of your objections are on the record, and the next iteration you will see will be the one that will be given to the jury, and your objections are preserved.
Thank you very much.

MR. ROMANO: Your Honor, can I just make one inquiry. I think I understood the Court's comments to the jury, but I want to make sure that I do, the Court instructs first and then counsel argues? That's the way I like to do it, and I tell you why.
When I was a trial lawyer, I used to hate to have to keep

saying to the jury now listen for this instruction, listen for that instruction, and so that's why -- I know a lot of judges -

MR. ROMANO: That's fine. I mean, because of the nature of our practice, we go to different districts and judges do it differently. And it's not critique or criticism, I just want to understand which way we're going, that's all. Thank you, your Honor.

THE COURT: That's the way we're going.
Okay.

MS. ENOS: Thank you, your Honor.

THE COURT: See you tomorrow morning at 8:30. MR.

ROMANO: Oh, your Honor, I'm sorry, I apologize. We have also redacted the changes on the Indictment -

THE COURT: Oh, yes.

MR. ROMANO: -- cover sheets, and I believe Ms. Enos has a copy of that. I think it's been provided to the clerk or, if not -

MS. ENOS: Not yet, but it's a clean copy of the indictment.

THE COURT: Give a copy to the other side because that will go on in with all the exhibits and a copy of the instructions to the jury.

MS. ENOS: Okay.

THE COURT: All right.

MR. HILL: Thank you, your Honor.

COURT: Oh, and, by the way, the jury doesn't get a free

lunch unless the case has been submitted to them, so I hope you'll tailor your arguments so that you're dcne before noon.

(The evening recess was taken.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

S/ MargaretGriener, CCR #3, RDR **04/23/01**
Official Reporter Date